

1 Frank Bell, State Bar No: 38955
2 A Law Corporation
3 333 Bradford Street Ste. 270
4 Redwood City, CA 94063
5 Tel: 650 365-8300; Fax: 650 366-8987
6 Email: FrankBell@FrankBellLaw.com

7 Attorney for Defendant
8 FRANK SALVADOR SOLORZA

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 OAKLAND DIVISION

12 UNITED STATES OF AMERICA,

13
14 Plaintiff,

15
16
17 v.

18 FRANK SALVADOR SOLORZA,

19 Defendant.
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NO: CR-09-0217 PJH

POINTS AND AUTHORITIES IN
SUPPORT OF DEFENDANT'S
PROPOSED JURY
INSTRUCTION ON COERCION

Date: June 2, 2010

Time: 2:30 p.m.

Judge: Hamilton

21 _____/
22 Defendant submits the following points and authorities in support of the requested
23 jury instructions (Ninth Circuit Model 6.5 and/or 6.6) as In Limine Motion No. FIVE:

24 MEMORANDUM OF POINTS AND AUTHORITIES

25 I. INTRODUCTION

26 On February 10, 2009, defendant FRANK SALVADOR SOLORZA was arrested.
27 He was initially charged in a Complaint with one count of impersonation of a federal

28 **IN LIMINE NO. FIVE**

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1 officer (18 U.S.C. Section 912). Later, on February 26, 2009, an Indictment was obtained
2 charging three counts. Count One was Conspiracy in violation of 18 U.S.C. Section 371.
3 Count Two charged Impersonation of a Federal Officer in violation of 18 U.S.C. Section
4 912 and Count Three charged Aiding and Abetting Attempted Extortion by a Federal
5 Officer in violation of 18 U.S.C. Section 872. Subsequent to the original Indictment, on
6 October 22, 2009, a Superseding Indictment was returned charging Solorza with multiple
7 counts of Conspiracy (Count One-18 U.S.C. Section 371), Impersonation of a Federal
8 Officer (Counts Two and Three -18 U.S.C. Section 912) and Attempted Extortion by a
9 Federal Official (Counts Four, five, Six and Seven-18 U.S.C. Section 872).

10 The charges result from an investigation by ICE agents who had been informed in
11 early February 2009 by the Escatel-Conchas family that unknown suspects were
12 attempting to extort \$50,000 from them with threats of jail time and deportation.
13 Defendant was arrested when he approached the house of one of the victims. Immediately
14 after the arrest he told agents that he was threatened and coerced by the perpetrators and he
15 makes this motion for a duress instruction based on the following facts and law.

16 II. STATEMENT OF FACTS/OFFER OF PROOF

17 Defendant, FRANK SOLORZA, will testify in the matter. Other witnesses will be
18 called by the defense. The testimony will be as follows. Solorza is married and has four
19 children, three young daughters and one young son. In late January, 2009, defendant was
20 on Roosevelt Street, at Red Morton Park, in Redwood City, with his children who were
21 playing soccer. While he was there a man approached him and asked if he knew the man to
22 whom he had been talking, his cousin "Beto." Defendant replied that he was his cousin.
23 The man asked if he was an "Escatel" too and defendant replied that he was a "Solorza"
24 The man asked if defendant wanted his papers "fixed" too. Defendant stated that he was a
25 U.S. Citizen and did not need this persons help.. The man followed defendant to his car.
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1 The man saw defendant's son and commented, "This is your boy, huh?" He also looked
2 over to defendant's car and remarked how it could really get "messed up."

3 The following day three people, going by the name's "Zora", "Pelon", and "Chino,"
4 confronted defendant at his home. They claimed to be East Redwood City Nortenos. They
5 showed defendant a long list of names and they pointed to a name at the top of the list,
6 Jesus Garza. Defendant also saw his brother "Lorenzo" and his sister "Lupe" on the list
7 and they said that these people would all be deported if they did not get their papers fixed.
8 They said "we know your kids" and they told him he needed to help them out. After tying
9 a red bandana to the steering wheel of defendant's truck they explained that when they saw
10 his car they would come by to talk with him. Initially, they said, they just want to use his
11 phone.

12 Later, they were constantly pressuring him and they made constant threats to his
13 family if he did not cooperate. These individuals then began to meet with defendant,
14 choosing when to arrive. They were often unannounced. Initially they forced defendant to
15 change his cell phone settings so as to block the caller identification of outgoing calls.
16 They would take his cell phone and use it to make phone calls to people unknown to the
17 defendant. These calls were made speaking in Spanish and sometimes using a device to
18 disguise their voice.

19 Defendant never saw a gun but at least one person threatened with him with a knife
20 while defendant was at work. This was witnessed by two or three individuals who worked
21 with defendant.¹ On another occasion persons matching the description of the gang
22 members came to defendant's work and asked if defendant was at work, using foul
23 language and they were threatening in their demeanor.
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25
26 ¹ Defendant has provided the government with the statements of two of these individuals.
27 There may be others who saw people at his work or at his house and neighborhood. Investigation
is continuing.

1 Defendant reluctantly agreed to let them use his cell phone to make calls . Often
2 they would use the phone out of his hearing “If you go to police we will find out and your
3 wife and kids will go down,” was the type of threat they would make. Defendant felt
4 trapped in a box He worked 3 nights a week from 10:00 p.m. until 7:00 a.m. They were
5 aware of his work schedule and came by his work. His wife worked full time, Monday
6 through Friday, at a law firm in San Mateo. Defendant did not feel that the police could
7 protect him, or his family, from these people.

8 Defendant was aware of gang members in the Bay Area retaliating against
9 individuals or their families for cooperating with the police . The Government’s own
10 investigation in consultation with the Gang Intelligence Unit of the San Mateo County
11 Sheriff’s Department (Det. Gabriel Huerta, Badge No. 855) revealed that defendant was
12 correct when he stated that Nortenos are prevalent in the area of Roosevelt Park and Red
13 Morton Park in Redwood city and that Nortenos “claim” the parks. In addition, the Gang
14 Unit revealed that one of the names used by the persons who confronted defendant, i.e.
15 “Pelon,” was a name known to the Gang Unit and generally matched the description given
16 by the defendant to ICE at the time of his arrest.

17 Sometime before Feb 10, 2009 they told him they wanted him to pick up a
18 “package” somewhere in Redwood City. He told them he didn’t want to do this and he
19 reminded them about their promise that all they wanted was to use the phone a few times
20 and then they would leave him alone. They told him that “We will tell you when your
21 done.”

22 During the above noted confrontations with the three individuals, defendant was
23 told that if he didn’t cooperate someone in his family would “go down,,” which meant to
24 him that they would be seriously injured or even killed. “We know where your children
25 play.” “We know where you live.” “We know where you work.” “There are a lot of us
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1 and we will be watching you around the clock.” “Don’t go to police because we will get
2 your kids.” These were the common threats and threads of the threats.

3 The morning of February 10, 2009, “Pelon” came alone to defendant’s home and
4 told him that he would be picking up a “package” later that day. Later that day, using a
5 device to disguise his voice, “Pelon” made two calls on defendant’s cell phone. Solorza
6 drove his wife’s car to take his daughter to her soccer practice. He was followed by the
7 gang members. After dropping off his daughter defendant was told where to park and to
8 put on a previously purchased clown costume. He rode a little bicycle to a particular
9 house. He was told to pick up a “suitcase” that would be left for him. Once he had the
10 “package” he was told to throw it into a car of theirs as they passed by. He was told they
11 would wait on the corners of the street so as to make sure he followed their instructions.
12 When they got the “suitcase” they would leave him alone.

13 Defendant then rode the bicycle over to the house. Upon arriving he saw an
14 unknown person, accompanied by his cousin, Jesus Escatel, with the “suitcase.” He was
15 shocked to see his cousin. He then waved to the gang members to signal he was not going
16 to carry out what they had asked of him. At this point the unknown man communicated
17 that he was an undercover ICE agent and place defendant under arrest.

18 Defendant files this motion for a duress jury instruction, No. 6.5 and/or 6.6 of the
19 Manuel of Model Criminal Jury Instructions for the Ninth Circuit. For the reasons
20 discussed below, the court should grant the motion.

21 III. ARGUMENT

22 There are three elements of the duress defense: (1) an immediate threat of death or
23 serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) no
24 reasonable opportunity to escape the threatened harm. *Contento-Pachon* 723 F. 2d 694
25 (9th Cir. 1984).
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1 The element of immediacy requires that there be some evidence that the threat of
2 injury was present, immediate, or impending. *Contento-Pachon*, 723 F. 2d 694. In
3 *Contento-Pachon* the defendant was a Colombian taxi-driver who was proposed a job by a
4 Jorge to swallow cocaine-filled balloons and transport them to the United States.
5 *Contento-Pachon*, 723 F. 2d 693. Contento-Pachon told him no. In response, Jorge
6 mentioned facts about Contento-Pachon's personal life, including private details, which
7 Contento-Pachon had never mentioned to Jorge. Jorge told Contento-Pachon his failure to
8 cooperate would result in the death of his wife and three year-old child. After the second
9 time threatened Contento-Pachon agreed to cooperate. The courts believed that the
10 defendant was dealing with a man deeply involved in the exportation of illegal substances.
11 *Contento-Pachon*, *Id.* That large sums of money were at stake and, consequently,
12 Contento-Pachon had reason to believe Jorge would carry out his threats. Jorge had gone
13 to the trouble to discover that Contento-Pachon was married, that he had a child, the names
14 of his wife and child, and the location of his residence. The courts found these were not
15 vague threats of possible future harm. *Contento-Pachon*, *Id.*

16 Here Mr. Solorza is sought out by gang members looking to "hire" him. They find
17 him at a public park, they identify his child and mode of transportation, they find where he
18 lives often stopping by unexpectedly. They have invested time and money into a high-risk
19 plan, with a significant payout. They have the capability of carrying out their threats
20 immediately and at any time.

21 The essential nature of Mr. Solorza's action's under duress support his "well
22 grounded fear that the threat would be carried out". *Contento-Pachon* 723 F. 2d 694 (9th
23 Cir. 1984)

24 Mr. Solorza lacked a reasonable opportunity to escape the threatened harm. The
25 opportunity to escape must be reasonable. *Contento-Pachon* 723 F. 2d 694. In *United*
26 *States v. Otis*, 127 F. 3d 829, 835 (9th Cir. 1997), Monsalve was one of seven defendants
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1 convicted of various conspiracy, money laundering, and gun crimes. Monsalve's testimony
2 established that he lost \$300,000 of the Cali cartel's money. The cartel did not believe this
3 and kidnapped his father in Columbia and only agreed to release him if Monsalve worked
4 for them in the U.S. The government argued that Monsalve could have escaped by
5 cooperating with the American authorities. The appeals court did not see how police
6 protection would have protected his father in Columbia. The appeals court found
7 Monsalve should have received a duress instruction. *Id.*

8 Here, the people threatening harm to Mr. Solorza also threatened harm to Mr.
9 Solorza's immediate family. They knew what his young children looked like. They had
10 been to where he and his wife and children lived. If Mr. Solorza was to go to the
11 authorities, this protection may not have protected his family. The trier of fact should
12 decide whether one in his position might believe that...reporting the matter to the police
13 did not represent a reasonable opportunity of escape. *Contento-Pachon 723 F. 2d 694.*

14 IV. CONCLUSION

15 For the reasons set forth above, Mr. Solorza has sufficiently established a showing
16 to support a duress defense and makes a motion for the duress jury instruction.

17 Dated: May 18, 2010

Respectfully submitted,

21 _____
FRANK BELL
Attorney for Defendant,
22 FRANK SALVADOR SOLORZA
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